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No. 00-1214

In The
Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari
To The Supreme Court of Alabama

MOTION FOR LEAVE TO FILE UNTIMELY BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the State of Alabama may subject a defendant to a jury trial of a serious misdemeanor carrying a potential jail sentence of up to one year while denying him counsel and then, upon conviction, impose a suspended thirty-day jail sentence, a fine of $500, and two years' probation.

MOTION FOR LEAVE TO FILE LATE BRIEF

Pursuant to Rule 21, Rules of the Supreme Court, the National Association of Criminal Defense Lawyers (NACDL) moves this Court for leave to file this brief *amicus curiae* in support of the respondent in the above-entitled matter. The brief was due on August 20, 2001. The brief was not filed on time because of a miscommunication between the undersigned and the primary author of the brief, Professor Steven Duke (for which the undersigned accepts full responsibility) regarding who was going to forward the brief to Cockle Printing.

Mr. Mills, counsel for respondent, has consented to the late filing of the brief. The undersigned contacted Ms. Morman, counsel for petitioner, to obtain her consent, but has not heard back from her.

Good cause for filing this brief *amicus curiae* out of time exists because Professor Duke and Mr. Liotti have written an excellent brief, and the interests of justice would not be served if the undersigned's oversight prevented the Court from having the benefit of their trenchant analysis. Professor Duke wrote the seminal law review article in this area, The Right to Appointed Counsel: Argersinger and Beyond, 12 Am. Crim. L. Rev. 601 (1975), which was cited twice by the dissent in Scott v. Illinois, 440 U.S. 367, 380, 383 (1979). He was appointed by the Court to represent the respondent in the landmark case of United States v. Cronic, 462 U.S. 1128 (1984), and he represented the respondent in United States v. Jackson, 390 U.S. 570 (1968), as well. Mr. Liotti has also written extensively on the right to counsel. See, e.g., Does Gideon Still Make a Difference?, 2 N.Y.C.L. Rev. 105 (1998).

As an organization, NACDL files *amicus* briefs of consistently high quality, which have been cited in numerous opinions of this Court. See, e.g., I.N.S. v. St. Cyr, ___ U.S. ___, 121 S. Ct. 2271, 2291 n.50 (2001); Texas v. Cobb, 532 U.S. 162, ___, 121 S. Ct. 1335, 1342 (2001); Lopez v. Davis, 531 U.S. 230, 244 n.6 (2001); United States v. Rodriguez-Moreno, 526 U.S. 275, 281 (1999); United States v. Balsys, 524 U.S. 666, 674 n.3 (1998); Bryan v. United States, 524 U.S. 184, 196 (1998); Almendarez-Torres v. United States, 523 U.S. 224, 269 (1998); Montana v. Egelhoff, 518 U.S. 37, 47 (1996); Ratzlaf v. United States, 510 U.S. 135, 146 (1994); Godinez v. Moran, 509 U.S. 389, 388 (1993); Georgia v. McCollum, 505 U.S. 42, 69 (1992) (dis. opn.); Riggins v. Nevada, 504 U.S. 127, 144 (1992) (conc. opn.). The Court has granted the relief sought here on prior occasions. See, e.g., City of Simi Valley v. Young, 531 U.S. 1104 (2001); American Foreign Service Ass'n v. Garfinkel, 489 U.S. 1050 (1989); Mansell v. Mansell, 488 U.S. 906 (1988); Booth v. Maryland, 487 U.S. 1081 (1987); United States v. Salerno, 479 U.S. 1015 (1986); Johnson v. Transportation Agency, Santa Clara County 479 U.S. 912 (1986); Arkansas v. Oklahoma, 465 U.S. 1018 (1984); Newport v. Fact Concerts, Inc., 450 U.S. 992 (1981); Flint Ridge Development Co. v. Scenic Rivers Assoc., 425 U.S. 902 (1976); Bonelli Cattle Co. v. Arizona, 414 U.S. 904 (1973); Goldstein v. California, 414 U.S. 883 (1973); Committee for Public Education & Religious Liberty v. Nyquist, 411 U.S. 946 (1973); Hunt v. McNair, 410 U.S. 952 (1973); United States v. Enmons, 409 U.S. 1034 (1972); Almeida-Sanchez v. United States, 409 U.S. 1035 (1972); Heller v. New York, 409 U.S. 1021 (1972); Goldstein v. California, 409 U.S. 976 (1972); Paris Adult Theatre I v. Slaton, 409 U.S. 945 (1972); United States v. 12 200-Ft. Reels of Super 8mm Film, 409 U.S. 909 (1972); Roaden v. Kentucky, 409 U.S. 910 (1972); Alexander v. Virginia, 409 U.S. 911 (1972); Victory Carriers, Inc. v. Law, 404 U.S. 908 (1971);

Accordingly, NACDL requests the Court grant leave to file this brief *amicus curiae* out of time.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Lereed Shelton's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate

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1. No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court, pursuant to Rule 37.3(a).

organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the denial of counsel to an indigent charged with a serious crime and required to defend himself in a jury trial without the guiding hand of counsel.

STATUTES INVOLVED

ALABAMA CODE

§13A-5-2. Authorized dispositions

(c) Every person convicted of a misdemeanor or violation shall be sentenced by the court to:

(1) Imprisonment for a term authorized by Section 13A-5-7; or

(2) Pay a fine authorized by Section 13A-5-12; or

(3) Both such imprisonment and fine

(d) Every person convicted of a felony, misdemeanor or violation may be placed on probation as authorized by law.

(e) This article does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt or impose any other lawful civil penalty. Such a judgment, order or decree may be included as part of the sentence.

§13A-5-7. Sentence of imprisonment for misdemeanors and violations.

(a) Sentences for misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following

limitations:

(1) For a Class A misdemeanor, not more than one year.

§ 13A-5-12. Fines for misdemeanors and violations.

(a) A sentence to pay a fine for a misdemeanor shall be for a definite amount, fixed by the court, within the following limitations:

(1) For a Class A misdemeanor, not more than $2,000.00.

§15-22-52. Conditions of probation.

The court shall determine and may at any time modify the conditions of probation and may include among them the following or any other condition. Such conditions may provide that the probationer shall:

(1) Avoid injurious or vicious habits;

(2) Avoid persons or places of disreputable or harmful character;

(3) Report to the probation office as directed;

(4) Permit the probation officer to visit him at his home or elsewhere;

(5) Work faithfully at suitable employments as far as possible;

(6) Remain within a specified place;

(7) Pay the fine imposed or costs or such portions thereof as the court may determine and in such installments as the court may direct;

(8) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; and

(9) Support his dependents to the best of his ability.

§15-22-24(d)

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(2) If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence...

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(4) The court shall not revoke probation and order the confinement of the probationer unless the court finds on the basis of the original offense and the probationer's intervening conduct, either of the following:

a. No measure short of confinement will adequately protect the community from further criminal activity by the probationer.

b. No measure short of confinement will avoid depreciating the seriousness of the violation.

STATEMENT OF THE CASE

Respondent LeReed Shelton was accused of third-degree assault, a class A misdemeanor carrying a possibility of a jail sentence of up to one year (Alabama Code §13A-5-7) and a fine of up to $2,000.00 (Alabama Code §§13A-5-2, 13A-5-7, 13A-5-12). He was not offered counsel if indigent. He elected a jury trial and represented himself before the jury, unsuccessfully. He was sentenced to 30 days in jail, a $500 fine, and restitution. The jail sentence was suspended and he was placed on two years' probation. The Alabama Supreme Court affirmed his conviction but vacated the suspended jail sentence because respondent had not had or waived counsel and the court believed that the suspended jail sentence was invalid because it could not be carried out consistent with respondent's Fourteenth and Sixth

Amendment right to counsel. This Court granted the State's petition for a writ of certiorari to consider the constitutional validity of the Alabama court's decision.

SUMMARY OF ARGUMENT

A jail sentence of any duration cannot be carried out or executed if the defendant was denied counsel for his defense. To do so would clearly "imprison" him contrary to Scott v. Illinois, 440 U.S. 367 (1979) and involve a "loss of liberty" contrary to Argersinger v. Hamlin, 407 U.S. 25 (1971). Accordingly, it was entirely lawful for the court below to vacate the thirty-day suspended sentence imposed on respondent who was required to defend himself in a jury trial without counsel. Whether it was "unconstitutional" to "impose" such a sham sentence on the accused by suspending it and placing him on probation may be of interest to theoreticians but is not crucial to the correct resolution of this case. Clearly, Alabama was not required by the Constitution to engage in the charade of threatening the defendant with a jail sentence it could not under any circumstances actually inflict.

Should this Court conclude that it is constitutionally permissible to impose a suspended jail sentence on an uncounseled defendant and then later revoke probation and send the defendant to jail, it will have ripped the soul out of Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1971) and invited the States to circumvent the right to counsel by sending defendants to prison in stages without ever subjecting the issue of guilt to serious adversary testing. At the very least, the Court should cap that invitation by revisiting Argersinger and Scott and

ruling consistent with Argersinger, Duncan v. Louisiana, 391 U.S. 145 (1968), and Baldwin v. New York, 399 U.S. 66 (1970), that anyone who has a Sixth Amendment right to a jury trial cannot be denied a lawyer to make that right meaningful. A "criminal prosecution" means no less when applied to the right to a jury trial than when applied to the right to assistance of counsel. Therefore, respondent's conviction, as well as his sentence, was unconstitutional.

ARGUMENT

The decision of the court below is correct. Alternatively, if a suspended jail sentence (in addition to a substantial fine) can sometimes be imposed on an indigent defendant who is denied counsel, the underlying conviction is invalid where, as here, the defendant faced charges sufficiently serious to guarantee him a Sixth Amendment right to a jury trial. Accordingly, if the Court rejects the rationale of the Alabama Supreme Court, it should invalidate respondent's underlying conviction or remand to permit the court below to do so.

Nearly forty years ago, this Court, in Gideon v. Wainwright, 372 U.S. 335 (1963), found the Sixth Amendment right to counsel "fundamental and essential to a fair trial." Id. at 343. Justice Black, speaking for a unanimous Court, said that lawyers are "necessities, not luxuries." Id. at 344. He said the "noble ideal" of fair trials "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him," and declared that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id.

Although there was nothing in Gideon that limited its rationale to felony charges, many state courts read Gideon as not requiring counsel in misdemeanor cases. Nonetheless, most states in the decade after Gideon did extend the right to counsel to some misdemeanants.[2] Some even went all the way, extending the right to every indigent accused of any offense, petty or serious.[3]

This Court returned to the problem in Argersinger v. Hamlin, 407 U.S. 25 (1971). Argersinger had pled guilty in a Florida court to carrying a concealed weapon, an offense punishable by up to six months in jail and a $1,000 fine, without being informed of his right to counsel. He was sentenced to a $500 fine or 90 days in jail. Id. at 26. Alleging that he had been indigent and unable to afford counsel, he sought a writ of habeas corpus. The Florida Supreme Court extended the right of appointed counsel to offenses punishable by more than six months' imprisonment but, since Argersinger's offense was just under the line, dismissed Argersinger's writ.

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2. See Comment, "Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States," 3 Creighton L. Rev. 103 (1970).

3. Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966). "Apparently, in nine states virtually all misdemeanants have the right to appointed counsel...." Comment, supra note 2, at 124. That still seems to be the case. "[M]any, if not a majority of, States guarantee the right of counsel whenever imprisonment is authorized by statute rather than actually imposed." Nichols v. United States, 511 U.S. 738, 748 (n. 12) (1994). See also, Brief of Texas, et al., Amici Curiae, 22.

Justice Douglas noted for this Court that the Sixth Amendment contains standards for "all criminal prosecutions." Among the rights guaranteed by that amendment are the right to a speedy and public trial, the right to know the charge, the right of confrontation, and the right to compulsory process.[4] Yet the only right guaranteed by the Sixth Amendment which had been limited by type of offense is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968), restricted such right to offenses punishable by more than six months in jail (regardless of the actual punishment imposed). See also, Baldwin v. New York, 399 U.S. 66, 69 (1970) ("no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"). Justice Douglas distinguished Duncan's limitation with the observation that the right to jury trial "has a different genealogy and is brigaded with a system of trial to a judge alone." Argersinger, 407 U.S. at 29. "While there is historical support for limiting...trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel...." Id. at 30 (citation omitted). The Court

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4. The Sixth Amendment provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

therefore rejected "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." Id. at 30-31.

Putting aside the right to counsel where "loss of liberty is not involved,"[5] the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."[6]

Commentators read Argersinger as creating a two-tiered analysis of the right to counsel in misdemeanor cases.[7] The first tier or screen was whether the offense was sufficiently serious to be a "criminal prosecution" for purposes of the right to a jury trial. That ordinarily meant that any authorized jail term of more than six months was, per Duncan and Baldwin, a sufficient gauge of seriousness to trigger the jury trial right regardless of the sentence actually imposed. If the offense was "serious" under the Duncan/ Baldwin test, Argersinger

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5. Id. at 37.

6. Id.

7. See, e.g., S. Krantz, C. Smith, D. Rossman, P. Froyd & J. Hoffman, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin 69-117 (1976); S. Duke, "The Right to Appointed Counsel: Argersinger and Beyond," 12 Am. Crim. L. Rev. 601 (1975). Justices Brennan, Marshall and Stevens advocated this approach in Scott, 440 U.S. at 375 (dissenting opinion), as did Justice Blackman, 440 U.S. at 389 (dissenting opinion).

left undisturbed the understanding that the charge was not only a "criminal prosecution" for the right to trial by jury but also for all other Sixth Amendment rights, including the right to counsel. Argersinger expressly dealt only with cases in which "loss of liberty was involved." In such cases, the Court said, there is no need to examine the "seriousness" question, no need to find the right to trial by jury in order to find the right to counsel, for the latter is even more fundamental than the former, and any deprivation of liberty is sufficiently serious to require the crucial help of counsel. Actual loss of liberty, then, was a second screen or second stage of analysis necessary only if no "criminal prosecution" was otherwise found by applying Duncan's criteria.

This Court took a sharply different approach in Scott v. Illinois, 440 U.S. 367 (1979), opining that Argersinger "did indeed delimit the constitutional right to appointed counsel in state criminal proceedings...[and] [w]e therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id. at 373-74 (emph. added). There was, of course, nothing in the Argersinger opinion or in Scott's analysis of it to warrant the injection of "only." Indeed, if Scott's dictum were taken literally, a person could be lawfully convicted of murder without counsel so long as he wasn't imprisoned. As Justice Brennan cogently observed in his Scott dissent, the majority not only misread Argersinger, it ignored the well-established precedents recognizing a constitutional right to a jury trial for people who are not imprisoned but nonetheless face charges upon which imprisonment in excess of sixth

months is authorized. Thus, if Scott were correct, a defendant like respondent Shelton in this case would have a Sixth Amendment right to a jury trial, per Baldwin and Duncan, but would have to enjoy that constitutional right without the assistance of counsel if the State elected to forgo imprisonment upon conviction. How can a prosecution be a "criminal prosecution" for purposes of the Sixth Amendment's right to a jury trial but not be a "criminal prosecution" for purposes of the Sixth Amendment's right to counsel? The Court in Scott did not say.

Although the court below did not question the holding in Scott and respondent will presumably not do so either, we respectfully urge the Court not to reaffirm the "imprisonment only" approach of Scott without at least reconsidering its illogic and its misinterpretation of Argersinger. We especially urge the Court not to extend Scott to allow the imposition of a suspended prison sentence while denying the accused the benefit of counsel. That would be tantamount to a fundamental rejection of Gideon itself.

I.

THE SUSPENDED JAIL SENTENCE WAS PROPERLY VACATED.

A. A suspended jail sentence may not be carried out or executed if the defendant was denied counsel.

Argersinger and Scott agree that even a day in jail, imposed as punishment for a crime, cannot be constitutionally carried out unless the defendant was afforded counsel at his trial or guilty plea. Accordingly,

LeReed Shelton cannot be jailed if probation is revoked because he would be jailed not for violating probation but for the underlying offense upon which he was originally sentenced. Cf., Johnson v. United States, 529 U.S. 624, 700 (2000) ("[w]e ... attribute postrevocation penalties to the original conviction). Not only is this the universal understanding of what happens when probation is revoked and a suspended sentence reimposed, it is clearly implicit in the Alabama statutory scheme. Alabama Code §15-22-54 (d)(2), provides that upon revocation of probation, the court may impose the sentence that was suspended or any lesser sentence. Section (d) (4) provides that when the court revokes probation and imposes confinement, that decision is grounded "on the basis of the original offense and the probationer's intervening conduct." (Emphasis added). Thus, unlike the situation in Nichols v. United States, 511 U.S. 738 (1994), where an uncounseled misdemeanor conviction resulted in a felony status for a second offense, the punishment imposed when probation is revoked is for the original offense, not the subsequent conduct involved in the probation violation. As the Chief Justice emphasized in his Nichols opinion, repeat-offender laws penalize "only the last offense committed by the defendant." 511 U.S. at 747. Although Nichols itself was highly debatable (it overruled a recent decision to the contrary in Baldasar v. United States, 446 U.S. 222 (1986)), the difference between Nichols and the instant case is fundamental.

Under a recidivist statute such as that in Nichols, the defendant can be imprisoned if and only if his second crime is proved beyond reasonable doubt, with all Sixth Amendment protections, including assistance of counsel. In contrast, if respondent could be imprisoned after a

probation revocation, that could be accomplished in entirely informal, unstructured proceedings where proof standards are amorphous and far less exacting and rigorous than those applicable in a criminal prosecution.[8]

If a suspended sentence could be carried out although the accused was denied counsel, respondent could have received a suspended sentence of up to one year in jail and a $2,000 fine for his Class A misdemeanor of third-degree assault. See Alabama Code §§13A-5-2, 13A-5-7, 13A-5-12. The conditions of probation could hardly be broader or vaguer. They include avoiding "injurious or vicious habits," "persons or places of disreputable or harmful character," and "any other condition." Alabama Code §15-22-52. The requirements of Argersinger and Scott could easily be circumvented if the state could deny counsel, convict the defendant of a misdemeanor, sentence him to a suspended term of imprisonment up to one year, suspend the sentence, place him on probation, then revoke probation for injurious or vicious habits, associating with undesirables, failure to report, or some other vague infraction. He would go to jail without ever having an opportunity to defend against the underlying criminal charges with the assistance of counsel.

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8. Indeed, one who receives a suspended sentence subject to probation in Alabama can be imprisoned with virtually no process at all, pending the revocation proceedings. Alabama Code §15-22-54 (d) authorizes a probation officer to arrest a probationer without a warrant and his statement that there has been a violation is sufficient authorization to detain the probationer in county jail.

We do not understand the petitioner to contend that such a procedure could be lawful, i.e., that a suspended sentence can be carried out if the defendant was denied counsel at his trial. Petitioner is unclear about its position on that issue.

The State seems to argue that a suspended jail sentence is permissible because there has been no "actual imprisonment" and until that happens, there is no violation of Scott, even though Scott said that no "indigent criminal defendant [can] be sentenced to a term of imprisonment" absent assistance of counsel. 440 U.S. at 374. Petitioner's Brief, at 9. Thus, petitioner seems to believe that the jailhouse doors must actually be closed and locked on the defendant's body before he retroactively acquires a right to counsel. Were that so, even an unconditional, unprobated jail sentence could not be invalidated on right to counsel grounds so long as it was stayed pending appeal. That is manifestly not so. No coherent argument is made by petitioner that the State may imprison someone in Shelton's shoes without violating the Constitution. Thus, it is hard to understand just what fault petitioner finds with the decision of the court below.

Most, if not all, of the lower court decisions cited by petitioner that suggest that a suspended sentence is not actual imprisonment (Petitioner's Brief, 16-19), involve questions of the validity of the conviction, not the validity of the sentence. Here, as there, the validity of the conviction was not questioned by the court below. The petitioner does not point to any decision that it says actually allows a defendant to be imprisoned on a previously suspended sentence when he was denied counsel.

Petitioner argues that if a suspended sentence triggers the right to counsel, this would divert "money and time to resolve misdemeanor offenses and reexamine the use of uncounseled convictions for enhancement purposes.... Finally, successful challenges would emasculate anti-recivism statutes...." Petitioner's Brief, at 21. This would be so, however, only if imposing a suspended sentence invalidates the underlying conviction, and the Alabama Supreme Court clearly held that it does not (J.A. 40). The Brief of Texas, et al., Amici Curiae, appears equally confused on this point. See id. at 25, 28. Indeed, although Amici repeatedly characterize the decision of the court below as "expanding" the right to counsel, it is not clear how Amici think that has been accomplished. Like petitioner, Amici do not clearly assert that a suspended sentence can actually be carried out. Rather, they seem concerned that such a sentence would invalidate the underlying conviction even if no effort is made to carry out the sentence. That issue is not before the Court.

Amici Curiae in support of petitioner imply that unless a state can impose a suspended jail sentence, it has no way to impose probation and the decision below therefore significantly restricts the States in their ability to utilize probation. Amici Br. at 27. The States, however, are not required to link probation to a suspended jail sentence. Connecticut, for example, has a process called "Accelerated Pretrial Rehabilitation" under which a defendant, with the permission of the court, is placed on probation before adjudication. If the probation is successful, the charge is dismissed and all records are expunged. If probation is violated, the defendant does not automatically go to jail, the charges are simply reinstated and the process begins where it left

off before probation. Conn. Gen. Statutes §54-56e. Assuming that such probation is not a "loss of liberty" within the meaning of Argersinger, there is no reason why it could not be imposed without affording counsel.

B. A sentence that cannot be carried out without violating the Constitution is itself unconstitutional, or in any event, plainly within the power of the State of Alabama to vacate or decline to impose.

Petitioner and Amici Curiae in its support characterize the holding of the Alabama Supreme Court as "extending" the right to appointed counsel in misdemeanor cases where a suspended sentence is imposed rather than "actual imprisonment." While such would be a defensible position for the court to have taken, it did not do so. Rather, the Alabama Supreme Court clearly -- and merely -- held that a conditional or probationary jail sentence can never actually be carried out if the defendant was denied counsel and is therefore a nullity. Had the Alabama Supreme Court held that Shelton had a constitutional right to counsel that was violated by his prosecution, rather than by his sentence, it would have vacated the conviction as well as the sentence.

Since the Alabama Court was clearly right in viewing the suspended jail sentence as one that cannot be executed without running afoul of Argersinger and Scott, it was also right in vacating that portion of the sentence. Whether entering a judgment that purports to enter an invalid sentence, i.e., a sham sentence, is itself a violation of the Constitution was not reached by the Alabama

Court. Arguably, the judgment appears to have been a straightforward application of Alabama law to vacate a sham sentence -- one that couldn't be carried out without violating the Constitution. As such, it should clearly be affirmed.

II

IF A SUSPENDED JAIL TERM MAY CONSTITUTIONALLY BE IMPOSED WITHOUT PROVIDING COUNSEL, AND ULTIMATELY CARRIED OUT, THEN THIS COURT SHOULD RECONSIDER SCOTT'S IMPRISONMENT-ONLY PRINCIPLE, REVERT TO THE "SERIOUS OFFENSE" TEST OF BALDWIN AND DUNCAN, AND INVALIDATE RESPONDENT'S CONVICTION OR ALLOW THE COURT BELOW TO DO SO.

Good arguments can be made for extending the Sixth Amendment right to counsel to all crimes for which imprisonment is authorized, regardless of the sentence actually imposed. See T. Liotti, Does Gideon Still Make a Difference?, 2 N.Y.C. L. Rev. 105, 122 (1998). Misdemeanor charges are no less complex or legally arcane than felony charges and the rules of trial procedure -- understood by only a few lawyers -- are the same, whether trial is of a misdemeanor or a felony. There is some stigma attached to conviction of any offense for which jail has been authorized. Moreover, convictions for seemingly insignificant offenses can become highly prejudicial to the defendant who becomes again embroiled in the criminal process, for they may elevate his second misdemeanor to felony status, as in Nichols, or be used adversely as part of his criminal history in sentencing. The misdemeanor conviction can

also result in loss or denial of an occupational or professional license, ineligibility for various benefits or employments, and even deportation.[9] Whether the right to counsel should be so extended is not before the Court. If, however, the Court is inclined to add a serious hazard -- possible imprisonment if probation is revoked -- to the lengthy list of land mines already buried in uncounseled misdemeanorland, then the "imprisonment only" test of Scott must be abandoned.

If a valid suspended jail sentence may be imposed without counsel, it can presumably be one the duration of which is limited only by the statute authorizing sentences. In respondent's case, the vulnerability would be to a jail sentence of up to one year (plus a $2,000 fine). It is simply unthinkable that a state could be permitted to imprison someone for up to one year while denying him counsel, merely by doing it in stages that circumvent the provision of counsel.

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9. The charge for which respondent was convicted could theoretically cause the deportation of an alien. A sentence of one year makes a crime of violence an "aggravated felony", which subjects the violator to immediate removal. See 8 U.S.C. §ll0l(a)(43)(F), §l227(a)(2)(A)(iii). This is true whether the state calls the offense a misdemeanor or a felony and even though the entire sentence remains suspended. "Any reference to a term of imprisonment or a sentence with respect to any offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. §1101(a)(48)(B).

Thus, at the very least, the Court, if inclined to validate uncounseled suspended sentences, should apply Baldwin and Duncan and recognize a right to counsel whenever there is a right to a jury trial, e.g., when a jail sentence of more than six months is authorized.[10] That would at least limit the circumvention of the right to counsel to cases in which the suspended sentence was for six months or less.

CONCLUSION

For the foregoing reasons, the decision of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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10. As this Court has often recognized, there may be other charges so serious that they be deemed not petty and thus trigger a right to a jury trial even where a jail sentence of more than six months is not authorized. See Blanton v. City of North Las Vegas, 489 U.S. 538 (1989); see also Lewis v. United States, 518 U.S. 322 (1996). In any such case, there should certainly also be a right to counsel.